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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM T. WULIGER,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF POSITION OF PETITIONER WILLIAM T. WULIGER

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## Introduction

Title III of the Omnibus Crime Control And Safe Streets Act of 1968 (hereinafter referred to as "the Act") has been the basis for prosecutions against persons who have unlawfully intercepted, used or disclosed the wire communications of others. The majority of these cases have been prosecutions against an individual solely because he or she allegedly engaged in an unlawful interception. A few cases have been prosecutions against a defendant for both wiretapping and using or disclosing the contents of the intercepted wire communication. Until the prosecution of William T. Wuliger in the case sub judice, no attorney had ever been prosecuted solely for using information from a wire interception as evidence on the record during the course of formal judicial proceedings.

Upon review of this case, the United States Court of Appeals for the Sixth Circuit has acknowledged that it was confronted with a number of novel and

significant issues. However, its decision created more problems than it resolved, and fostered implications so vast as to threaten the very foundations of the adversary system. For instance, the Sixth Circuit has construed this Act to mean that it is criminal to use the contents of a wire interception even if the victim of the interception expressly consents to that use.

Similarly, the Sixth Circuit has indicated that, even in the face of a waiver which would render admissible the evidence from an interception, any subsequent use by an attorney in an attempt to present such evidence is criminal.

Furthermore, the Sixth Circuit has held that, with the possible exception of prosecuting attorneys, it constitutes criminal misconduct for a lawyer to use the contents of the a wire interception solely for the purpose of impeaching the subject of a wire interception during judicial proceedings.

Finally, and, in certain respects, most

significantly, the Sixth Circuit has construed the good faith provisions of the Act in such a way as to force attorneys to ignore both legal precedent and their ethical duty to zealously represent their clients, for fear of criminal prosecution.

In so doing, the Sixth Circuit has construed the Act in such a manner as to create absurd and devastating results. It has invaded the province of the state courts, impaired the independence of the judiciary and wreaked havoc upon the adversary system. It has also arbitrarily created one set of rules for federal prosecutors and a different, far more intrusive and stringent set of rules, destructive of the independence of the remainder of the bar.

For the reasons that follow, the Ohio Association of Criminal Defense Lawyers (hereinafter "Amicus"), respectfully submits that the instant case presents issues of such magnitude as to warrant this Court's attention.

## Statement of the Case and the Facts

Amicus hereby incorporates by reference the Statement of the Case And the Facts Set Forth in petitioner William T. Wuliger's Petition For A Writ of Certiorari, the same as if fully rewritten herein.

## Reasons For Granting Petitioner's Writ

### I. CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT MAY CONSIDER WHETHER THE PRESENTATION BY AN ATTORNEY OF EVIDENCE DEFINED BY THE WIRETAP ACT AS ADMISSIBLE CAN CONSTITUTE CRIMINAL CONDUCT.

The Sixth Circuit's decision in the case at bar holds that an attorney, or at least those attorneys who are not federal prosecutors, may be prosecuted and convicted solely for using the contents of an unlawful wire interception as evidence during formal legal proceedings: (1) Even though the subject of the wire interception has expressly consented to such use; (2) Even though such evidence would correctly be deemed admissible under the provisions of the Act; and (3) Even

though the attorney's use of such evidence was in conformity with legal precedent of the court system in which such use of evidence occurred.

If the "use" provisions of the Act were designed to protect an individual's interest in maintaining the privacy of his wire communications, as has been widely recognized,[1] then the further prosecution of petitioner Wuliger can serve no statutory purpose, since Polly Ricupero agreed, by and through her attorney, that Wuliger would be permitted to use her intercepted communications for purposes of his cross-examination of her. At least one court has held that, upon the consent of the subject of an unlawful wiretap, the contents of his intercepted communications become admissible evidence. United States v. Bragan, 499 F.2d 1376 (4th Cir., 1974). It would be absurd and contrary

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[1]See, e.g., Lam Lek Chong v. U.S. Drug Enforcement Admin., 929 F.2d 729 (D.C. Cir., 1991); United States v. Clemente, 482 F. 482 F. Supp. 102 (D.N.Y., 1979), aff'd 663 F.2d 207.

to the purposes of the Act to conclude that evidence may be admissible while, at the same time, to conclude that the attorney who presents the admissible evidence is thereby committing a crime.[2]

For the same reasons, the portion of the Sixth Circuit's opinion dealing with petitioner's waiver argument cannot withstand close scrutiny. Essentially, petitioner has argued that the tape recordings of Polly Ricupero's wire communications were admissible, pursuant to 18 U.S.C. § 2518 (10)(a), because Mrs. Ricupero's failure to file a motion to suppress or for a protective order constituted a waiver regarding admissibility. The Sixth Circuit acknowledged that Polly Ricupero may have waived that issue, but held,

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[2]One of the primary purposes of the suppression provisions of the Act is to ensure that courts do not become partners to illegal conduct. E.g. Gelbrand v. United States, 408 U.S. 41 (1972); In re Harkins, 624 F.2d 1160 (3rd Cir., 1980); In re Grand Jury Proceedings, 613 F.2d 1171 (D.C. Cir., 1979). Thus, such evidence cannot be admissible unless it is lawful for an attorney to proffer such evidence.

nevertheless, that the admissibility or inadmissibility of the tapes was irrelevant to the question of Wuliger's criminal liability.

In other words, an attorney who relies on established law as to waiver and "consent to use" – and, thereby, fulfills his ethical obligation to present admissible evidence favorable to his client – risks criminal sanctions!

The Sixth Circuit was willing to overlook this absurdity on the apparent basis that 18 U.S.C. § 2511 contains no express exception excluding such evidentiary uses from the scope of proscribed conduct. What the Sixth Circuit failed to realize, however, was that there are a variety of implied exceptions to the use provisions of the Act which courts have recognized in order to effectuate the purposes of the Act and to avoid absurd consequences.[3]

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[3]For instance, it is beyond dispute that it is lawful for a civil defendant in a § 2520 suit to use the contents

The implications of the Sixth Circuit's opinion are that there exists one body of law which governs the admissibility of evidence derived from wire interceptions and a different and independent body of law applicable to the question of whether an attorney who uses such admissible evidence thereby commits a crime. However, the language of the Act itself militates against such a dichotomy. Section 2515 provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if

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of a even an unlawful wire interception for purpose of presenting his defense. (McQuade v. Michael Gassner Mechanical & Electrical Contractors, Inc., 587 F. Supp. 1183 (D. Conn., 1984)), just as it is lawful for a prosecutor to use such information when presenting his case in chief in a § 2511 prosecution (United States v. Liddy, 354, F.Supp. 217 (D.C., 1973)). Thus, the lack of an express exception to § 2511 liability is hardly dispositive of this issue.

> the disclosure of that information would be in violation of this chapter. (Emphasis added).

Thus, pursuant to the plain meaning of this statutory provision, the act of presenting admissible evidence cannot constitute criminal conduct. In short, because there cannot be two difference standards for judging admissibility and criminality, if an attorney presents admissible evidence, he commits no crime.

It may still be argued that the language of the Act does not contain any provision which indicates that an impeachment use or a party's consent to use renders such evidence admissible. For the reasons set forth above, amicus submits that such an argument is unpersuasive. However, even assuming that such an argument has validity, it is, nevertheless, beyond legitimate dispute that evidence derived from even an unlawful wiretap is admissible following a waiver by the subject of the interception. 18 U.S.C. § 2518(10)(a) provides a mechanism for the suppression of such

evidence by an aggrieved party and further provides that such "...motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion." (Emphasis added). If such a motion is not timely asserted, the issue is deemed waived and the tainted evidence is deemed properly admissible. E.g., United States v. Scavo, 593 F.2d 837 (8th Cir., 1979); United States v. Johnson, 539 F.2d 181 (D.C. Cir., 1976), cert. denied 429 U.S. 1061); United States v. Sisca, 503 F.2d 1337 (2nd Cir., 1974), cert. denied 420 U.S. 1005. However, as expressly noted in § 2515, such evidence can be deemed admissible only if its disclosure does not violate the Act.

In the case sub judice, petitioner Wuliger presented the alleged tainted evidence following a waiver by the subject of the interception. Accordingly, the evidence was admissible and his use thereof lawful.

## II. THE SIXTH CIRCUIT'S OPINION, HOLDING THAT AN ATTORNEY MAY BE SUBJECT TO CRIMINAL SANCTIONS FOR PRESENTING ADMISSIBLE EVIDENCE OR EVEN ARGUABLY ADMISSIBLE EVIDENCE, CONTRAVENES FUNDAMENTAL CONSTITUTIONAL PROVISIONS RELATING TO THE ATTORNEY'S PRIVILEGES AND IMMUNITIES, THE CLIENT'S RIGHT TO DUE PROCESS OF LAW AND THE COURT SYSTEM'S AUTHORITY TO REGULATE ITS AFFAIRS.

This Court has, on occasion, taken note of the importance of zealous advocacy in our judicial system. In both Maness v. Meyers, 419 U.S. 449 (1975) and In re Watts, 190 U.S. 1 (1903), this Court has taken the position that the role of an attorney is so important to the administration of justice and to a client's right to due process of law that he should not be subject to punishment for the good faith performance of his duties.

As discussed more fully in petitioner Wuliger's petition, the Code of Professional Responsibility sets forth a variety of professional duties which a litigator must strive to fulfill. Pursuant to those duties, it is

incumbent upon a trial attorney to explore, use and present evidence which may be favorable to his client, provided that there exists at least a good faith argument in support of the admissibility thereof.

Let us assume for the sake of argument that Wuliger knew that Polly Ricupero's wire communications were intercepted without her knowledge or consent. It is, nevertheless, the position of amicus that Wuliger's professional obligations would have required him to present such evidence because there existed a body of law holding that even unlawfully acquired information may be used for impeachment purposes[4] or following the consent[5] or waiver[6] of the intercepted party. Moreover, there also

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[4]E.g., United States v. Eschavaria - Olarte, 904 F.2d 1391 (9th Cir., 1990); United States v. Caron, 474 F.2d 506 (5th Cir., 1973).

[5]E.g., United States v. Bragan, supra

[6]E.g., United States v. Scavo, supra.

existed substantial precedent for the proposition that, with or without consent to a wiretap, a person may lawfully intercept the wire communications of his or her spouse within the marital residence while the parties are still residing as husband and wife.[7] Moreover, it must be noted that, at the time that Wuliger used these tapes, the Sixth Circuit had not yet ruled on any of those issues.[8] Domestic relations courts within Wuliger's

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[7]E.g., Simpson v. Simpson, 490 F.2d 803 (5th Cir., 1974); Beaber v. Beaber, 41 Ohio Misc. 95, 322 N.E. 2d 910 (C.P. Stark County, 1974).

[8]In United States v. Jones, 542 F.2d 661 (6th Cir., 1976), the Sixth Circuit had refused to recognize a spousal exception, but the facts of Jones did not involve spouses still living together within the marital residence. Although the Jones court strongly indicated that it would not deem that additional fact to be dispositive, such a suggestion, however strongly made, remains dicta. Thus, it was still arguable even in the Sixth Circuit in 1989 that interspousal taps are not criminal if made in the marital home during cohabitation, as had been recognized in Simpson v. Simpson, supra, and other cases. It should also be noted that the Sixth Circuit's opinion in Fultz v. Gilliam, 942 F.2d 396 (6th Cir., 1991) -- upon which the Sixth Circuit relied in the case at bar - was not decided until two years after the alleged conduct referenced in the indictment herein.

state, on the other hand, had ruled such evidence admissible on a variety of grounds and had, in fact, specifically recognized the impeachment and spousal exceptions to the Act.[9]

Whether or not those various grounds for admissibility are ultimately recognized by the Sixth Circuit or by this Court is irrelevant to the issue of Wuliger's guilt or innocence. Amicus is not contending here that "mistake of law" necessarily and under all circumstances absolves a defendant of culpability for his criminal misconduct. Rather, it is the contention of amicus that, whether an attorney is correct or incorrect in his assessment of how a given court will view his position as to the bases for the admissibility of wiretap-related evidence, it is essential to the adversary system

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[9]E.g., Beaber v. Beaber, supra; see also, Cooper v. Cooper, unreported, C.A. Cuyahoga County, Case Nos. 49605 & 50022 (1/23/86); Fluharty v. Fluharty, unreported, C.A. Summit County, Case No. C.A. 8951 (11/29/78).

that he be granted sufficient latitude to represent his client based on any position which is reasonably arguable in good faith. Amicus respectfully submits that, without such latitude, it is impossible for a litigator to function in a meaningfully adversarial role within the judicial system.

The inevitable result of the Sixth Circuit's decision in this case, if permitted to stand, will be a chilling effect on the bar in general and an institutionalized conflict of interest between attorneys and the clients they represent. In sum, the client's right to the effective and zealous assistance of counsel will be undermined.

It is hardly unlikely that two classes of private-sector attorneys would develop as a result of the approach developed by the Sixth Circuit: (1) Those who simply will not risk the potential consequences of ever using even clearly lawfully taped evidence, regardless of the strength of the legal position favoring such use;

and (2) Those who will utilize such evidence in a covert manner so that the existence of any such recordings cannot be discovered. In the former case, the client's right to zealous legal representation will be emasculated; in the latter instance, the trial court -- which should be the ultimate arbiter of admissibility questions -- will never be presented with the opportunity to distinguish between lawfully and unlawfully acquired tapes or between admissible or inadmissible evidence. Nor will the trial court be in a position to determine whether counsel is using derivative evidence, which would be excludable as "fruit of the poisonous tree".

In the case sub judice, petitioner Wuliger was openly attempting to explore and present evidence on the record for an ultimate ruling by the trial court as to its admissibility. In so doing, he was relying on the representations of his client, precedent existing within Ohio's judicial system and case law from various federal

jurisdictions, as a dedicated trial attorney is ethically required to do.

Amicus respectfully submits that any construction of the Act which nullifies a lawyer's ethical duties and results in such a chilling effect on the fulfillment of his professional role would violate not only the client's rights to due process of law and adequate legal representation, but also the attorney's right to free speech and the liberty interests, privileges and immunities relating to the practice of his profession.

Beyond the damage to these individual rights, however, is the systemic harm which will inevitably result from such a construction of the Act. In every case involving the tape recorded conversations of third parties, the lawyer will be confronted with an unavoidable conflict of interest, if the Sixth Circuit's decision is permitted to stand. Due to the ever-present risk that he will be subject to criminal prosecution for an evidentiary use of taped materials, a lawyer's

independent judgment and undivided loyalty to his client will, of necessity, be subject to improper influence. It has consistently been held that a client is denied the effective assistance of counsel when such a conflict affects the zealousness of his attorney's representation of him. E.g., United States v. McLain, 823 F.2d 1457 (11th Cir., 1987); United States v. DeFalco, 644 F.2d 132 (3rd Cir., 1979); Phillips v. Warden, State Prison, 220 Conn. 112, 595 A.2d 1356 (1991). Pursuant to the Sixth Circuit's opinion, an attorney has a Hobson's choice of three alternatives when a client presents him with tape recordings of a third party's conversations: (1) To refuse or withdraw from representation; (2) To continue representing the client, but refuse to use the recordings, even if they are arguably lawfully obtained and/or admissible; or (3) To use the tape recordings despite the risk of his own loss of liberty attendant to a § 2511 prosecution.

If an attorney is to function as a zealous legal

representative within the adversary system, he must be free of such inherent conflicts of interest. He must be free to present his client's case in any manner which serve the client's interests, so long as his position is based upon existing precedent or upon reasonable arguments which can, in good faith, be advanced for the modification, extension or reversal of existing law. Without that freedom, he cannot practice his profession within the framework of the adversary system as it has existed since the inception of this country. The Sixth Circuit's opinion renders that zone of freedom illusory.

In addition to the devastating effect which the Sixth Circuit's opinion has upon a lawyer's role within the adversary system, it also insidiously invades the province of the state judiciary. According to the Sixth Circuit, an attorney may not rely on legal precedent issued by courts within his state as to the admissibility of tape recorded evidence. Indeed, petitioner Wuliger relied on Beaber v. Beaber, supra, which held that

evidence from a non-consensual wire interception was admissible for impeachment purposes and pursuant to what the court deemed to be the spousal exception to the Wiretap Act. The Sixth Circuit held that, notwithstanding such reliance, Wuliger will be subject to a second trial on those charges. Amicus respectfully submits that, if an attorney's reliance on state court precedent as to admissibility does not shield him from prosecution for his use of taped evidence, then that precedent is, as a practical matter, meaningless.[10] As a practical matter, admissibility of intercepted evidence will be determined not by the trial courts, but largely by the Department of Justice, which will selectively prosecute individuals such as Wuliger based on its view of whether the corresponding federal courts seem

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[10]Although the Sixth Circuit ruled that Wuliger would be subject to a second trial notwithstanding his reliance on precedent, at least one other federal circuit court has taken a contrary view, holding that such reliance obviates culpability. Rice v. Rice, 951 F.2d 942 (8th Cir., 1991).

receptive to such prosecutions. Quite simply, the state courts will be taken "out of the loop", if attorneys who practice in those courts may not rely on their precedent.

The Sixth Circuit's decision also has the practical effect of interfering with or supplanting the state court system's traditional disciplinary power, placing it instead in the hands of the Justice Department. In the normal course of a state court proceeding involving the use or attempted use of recordings derived from a wire intercept, the trial court would consider the circumstances and make rulings as to the legality and admissibility of such evidence. In such cases, an attorney who made an adversarial use of such materials in good faith reliance on precedent of the state's court system would be unlikely to incur any disciplinary sanction, and certainly should not be subject to prosecution. However, pursuant to the implications of the Sixth Circuit's opinion, that same attorney would face federal prosecution. Thus, the state's mechanism

for dealing internally with the alleged misconduct of members of its bar -- which has always functioned admirably in policing unethical conduct -- would be rendered superfluous. The ultimate power to target attorneys for punitive action would reside with the Justice Department, whose standard would not be based on whether the attorney was acting ethically and in good faith, but solely upon whether he presented allegedly tainted evidence.

Amicus respectfully submits that the Sixth Circuit's opinion has created an interpretation of the Act which is so intrusive upon, and inimical to, the adversary system, the independence of the judiciary and the traditional powers of the several states that it should not be permitted to remain standing. Accordingly, amicus submits that Wuliger's petition for a writ of certiorari warrants this Court's attention.

## III. THE SIXTH CIRCUIT'S DECISION FURTHER DIVIDES THE FEDERAL JUDICIARY AS TO THE MEANING AND SCOPE OF THE WIRETAP ACT AND RETROACTIVELY ESTABLISHES ARBITRARY DISTINCTIONS BETWEEN CLASSES OF PEOPLE WHO MAY OR MAY NOT BE PROSECUTED FOR VIOLATIONS OF 18 U.S.C. § 2511.

For a number of years, and even before the Sixth Circuit issued its decision herein, the various federal circuit courts of appeals have been in conflict as to the meaning and scope of the Act, at least as it relates to the legality of interfamilial wiretaps.[11] The decision of the Sixth Circuit in the case at bar serves only to create further division of opinion. For instance, the Sixth

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[11]As noted in Wuliger's petition, at pages 44-5, the Second and Fifth Circuits recognized an interspousal exception in 1989, whereas the Fourth and Eighth Circuits did not. Since that time, federal courts have continued to struggle with the question of the legality of interceptions within a family unit, as reflected in the 10th Circuit's conclusion that an interspousal wiretap is unlawful, whereas the interception one's child communication is lawful. See Newcomb v. Ingle, 944 F.2d 1534 (10th Cir., 1991), cert. denied 112 S. Ct. 903 (1992), and Heggy v. Heggy, 944 F.2d 1537 (10th Cir., 1991), cert denied 112 S. Ct. 1514 (1992).

Circuit's rejection of petitioner Wuliger's "consent-to-use" defense is in direct conflict with the law of the Fourth Circuit as set forth in United States v. Bragan, supra. Similarly, the Sixth Circuit's rejection of Wuliger's waiver argument is in conflict with the opinion of the Second, Eighth and District of Columbia Circuits, as expressed in United States v. Sisca, supra; United States v. Scavo, supra; and United States v. Johnson, supra. In addition, the Sixth Circuit's rejection of Wuliger's argument that the contents of a wire interception may be used for impeachment purposes creates a conflict with the First, Fifth, Seventh and Ninth Circuits, as set forth in United States v. Vest, 813 F.2d 477 (1st Cir., 1987); United States v. Caron, supra; Jacks v. Duckworth, 484 F. Supp. 1366 (D. Ind., 1980), aff'd 651 F.2d 480 (7th Cir., 1981); and United States v. Eschavaria - Olarte, supra.

Thus, following the Sixth Circuit's decision herein, the various circuits are more "Balkanized" than

they have ever been with respect to the meaning and scope of the Act. The resulting and continuing uncertainty as to nature and scope of proscribed conduct under the Act is of deep concern to the private bar.

This is particularly so where lawyers such as Wuliger can be prosecuted according to the geographical location where his conduct occurs. As noted in Wuliger's petition, based upon precedent in various federal jurisdictions, Wuliger could not have been prosecuted in the First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Eleventh or District of Columbia Circuits -- an area comprising 36 states, one unincorporated territory, one trust territory and the District of Columbia! Amicus submits that the determinative test of criminal culpability under the Wiretap Act should not be the geographical location of the defendant.

It is also troubling to the bar that, in addition to

discounting petitioner Wuliger's reliance on existing state and federal precedent, the Sixth Circuit's opinion provides that Wuliger will be subject to a second trial based on Sixth Circuit rulings which were not rendered until well after the conduct alleged by the government in its indictment against Wuliger.

For instance, as noted above, the Sixth Circuit did not hold, until 1991, that all non-consensual interspousal interceptions are unlawful, regardless of whether the spouses were residing together as husband and wife at the time of the interception. The Sixth Circuit's rulings in this case as to the issues of impeachment use, waiver and consent-to-use created new law, never before reached or even foreshadowed by the court and contrary to that of other jurisdictions. The retroactive application of those novel propositions to petitioner Wuliger is deeply disturbing to members of the bar, who are properly accustomed to practicing their profession and making evidence-related decisions based

on existing precedent, rather than upon the fear of what new approach another court may take at some later date.

What is most disturbing to this amicus and its membership, however, is that the Sixth Circuit creates two classes of attorneys based solely upon whether their client happens to be a private individual or the government. According to the implications of the Sixth Circuit's opinion, a prosecutor who uses unlawful recordings following a criminal defendant's waiver or for purposes of impeaching a criminal defendant might not be subject to prosecution for violation of § 2511, whereas a private attorney who engages in precisely the same conduct must stand trial.

Thus, for example, in a criminal proceeding, a prosecutor may use an unlawfully acquired recording to impeach the criminal defendant, but the defense attorney may not use an unlawfully acquired recording to impeach a key government witness.

Similarly, pursuant to the Sixth Circuit's reasoning, a prosecutor may use such tainted evidence for impeachment purposes, but a civil attorney in a domestic relations case may not use such evidence to impeach the opposing party. The Sixth Circuit's attempted justification of this artificial classification of attorneys was that: (1) The truth finding function of the courts is more important in criminal cases than in civil cases; and (2) Criminal proceedings are always conducted before a judge or magistrate, thus providing immediate judicial intervention when necessary, whereas civil discovery proceedings are not similarly safeguarded.

Amicus submits that the Sixth Circuit is incorrect on both counts. As to the truth-finding function of the courts, amicus disputes that the discovery of the truth in a criminal case is, per se, more important than it is in, for instance, a domestic relations case where the custody and welfare of minor children may be decided.

Moreover, as noted in Wuliger's petition, the impeachment exception to the Fourth Amendment exclusionary rule was not designed to aid in the determination of absolute truth, but to prevent a party from perpetrating a fraud upon the court via false or misleading testimony. Walder v. United States, 347 U.S. 62 (1954). Amicus submits that the integrity of the courts is equally important in every case, regardless of whether it is civil or criminal in nature.

As to the presence of judicial oversight of the use of intercepted information, the Sixth Circuit ignores the fact that both the Act and state law provide substantial safeguards relative to any improper use of evidence during pre-trial discovery. Sections 2515 and 2518 (10)(a) provide for the exclusion or suppression of any such evidence. Moreover, under Ohio law, a party who suspects that unlawful evidence will be utilized during a deposition, or who witnesses the use of such evidence during a deposition, may refuse to appear at deposition,

or adjourn the deposition if it has already commenced, and immediately seek judicial intervention via a motion for a protective order pursuant to Ohio R. Civ. P. 26(C) and 30(D). Thus, there exist adequate safeguards in civil actions to negate the Sixth Circuit's concerns of abuse due to a purported lack of judicial oversight. It is quite simply not necessary to adopt the Sixth Circuit's flawed holding in order to police improper conduct. A system already exists to provide for immediate judicial oversight and not even the government has contended that this system is not functioning well in that regard.

Finally, it appears that the distinction drawn by the Sixth Circuit between prosecutors and private attorneys is part of an unfortunate trend in which the Justice Department is seeking to remove its attorneys from the disciplinary supervision of the state courts. If the Sixth Circuit's opinion is permitted to stand, federal prosecutors will also apparently be free from the supervision of the Sixth Circuit as well, at least as it

relates to the enforcement of §§ 2511, et seq. At the same time, the Justice Department's control over the private bar will be vastly increased, thereby further eroding the authority of the judiciary to control its own evidentiary and disciplinary affairs.

Accordingly, amicus respectfully submits that this case warrants this Court's attention.

## Conclusion

The decision of the Sixth Circuit, the review of which is sought herein, presents unfortunate and frightening implications of vast and pervasive dimension. It portends a judicial system in which attorneys can no longer rely upon existing precedent or good faith arguments in deciding what evidence to present in proceedings to which their clients are parties.

It portends a system in which the mere existence of tape recorded evidence of any sort -- lawful or unlawful, admissible or inadmissible -- will necessarily create such a conflict between the interests of the

attorney and those of his client that an attorney's only recourse will be to withdraw as counsel from the particular case.

It further portends that the government will have free reign to target attorneys for prosecution, not based upon the nature of the attorney's conduct, but upon the geographical location of his practice.

Finally, it portends a future in which federal prosecutors are insulated from criminal accountability under the Wiretap Act even when they engage in precisely the same conduct which would lead to the prosecution of a non-governmental attorney.

Amicus respectfully submits that the Sixth Circuit's opinion carries implications so detrimental to and destructive of the adversary system, the independence of the judiciary and the sovereign power of the states that certiorari should be granted herein so that this Court may delineate the scope of the Act and the standards to be applied in future prosecutions under

18 U.S.C. § 2511.

Respectfully submitted,

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